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The Virtues of Thinking Small

CORINNA BARRETT LAIN*

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INTRODUCTION

In thinking about the topic of my panel—whether the end of the death penalty is near—my mind went back to Scott Sundby’s admonition several years ago that death penalty opponents ought to “think small” when thinking about abolition.¹ It may be that a single blockbuster event will lead to the collapse of the death penalty, Sundby argued, but most likely, the future of capital punishment in the United States will be determined by a cauldron of “micro-factors” that will render it simply too politically and economically costly to maintain.² At the time, Sundby was writing about declining death sentences and the role that better defense attorneys, more representative juries, and the availability of life without the possibility of parole (among other developments) had in the mix.³

For this symposium contribution—and in honor of Scott Sundby, and Miami being his new home—I decided to take him up on the charge to “think small” about the death penalty. We law professors are not used to that sort of thing. Our perspective tends to run from the top down—what the Supreme Court is doing, what the national public opinion polls say, what position the majority of states take on a particular death penalty practice. All of these are worthy considerations in thinking about whether the end of the death penalty is near, or at least a possibility. But what happens when we consider the death penalty from the bottom up, examining how individual actors (some small, some large) are affecting the administration of capital punishment in the United States? That is what I mean by thinking small.⁴

* Professor of Law and Associate Dean for Faculty Development, University of Richmond School of Law. Special thanks to Scott Sundby for inspiring me to “think small” and to Debby Denno and Jim Gibson for their comments on previous drafts. Thanks also to Lindsey Vann, Brennan Crowder, and Christina Crawford for superb research assistance.

1. Scott E. Sundby, *The Death Penalty’s Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEXAS L. REV. 1929, 1972 (2006).

2. *See id.* at 1964–72.

3. *See id.* at 1940–48.

4. To further clarify, these individual actors do not have to be thinking small, or even

I started by cruising the news. I wanted to get a feel for what was happening at the grassroots level and to assess the sort of impact that individual actions were having on the larger death penalty debate. So I looked at news clippings I had received over the past several years from Steve Hall's "StandDown" listserv, which distributes to its subscribers various articles, op-eds, and other news on the death penalty from across the country.⁵ There were thousands.

What I found was remarkable. Thinking small allows us to see how effective ground-level resistance to the death penalty can be, and in this symposium contribution, I briefly explain what I mean. In Part I, I discuss a few of the more noteworthy examples of thinking small, examining individual actions in a number of areas. In Part II, I discuss the substantial impact that these actions have had on the death penalty in practice, and how that impact has fundamentally changed America's death penalty debate. In Part III, I conclude with my own take on the death penalty debate—one that celebrates the virtues of thinking small but laments the need to do so.

I. THINKING SMALL

As one might imagine, the death penalty provides a multitude of opportunities for thinking small. A capital case that cannot manage to get a jury pool, even after summoning almost 1,000 potential jurors.⁶ A state governor who refuses to surrender a prisoner to federal authorities because they have stated their intent to seek the death penalty in the case, whereas the state has abolished it.⁷ Massive, trench-warfare litigation whenever the defendant is mentally ill.⁸ Death sentence challenge

thinking about the impact their actions might have on the larger death penalty debate at all. Thinking small is *my* approach, not theirs.

5. See THE STANDDOWN TEX. PROJECT, <http://standdown.typepad.com/> (last visited Oct. 1, 2012). The Listserv disseminates news links from nearly 20 national media sources, including the Associated Press, Bloomberg, McClatchy, NPR, and the Public News Service. Special thanks to Steve Hall for collecting and disseminating this information.

6. See Scott Sandlin, *Astorga Penalty Phase Lacks Jurors*, ALBUQUERQUE J., Sept. 8, 2011, <http://www.abqjournal.com/main/2011/09/08/news/astorga-penalty-phase-lacks-jurors.html>.

7. See Katie Mulvaney, *Faceoff Looms Over Suspect*, PROVIDENCE J., June 28, 2011, at A1 (reporting the Governor's refusal to turn over a suspect to the federal government because it would "go against Rhode Island's longstanding rejection of capital punishment"). Initially the First Circuit upheld the Governor's refusal, but it ultimately reversed itself after a rehearing by a five-judge panel. See *Rhode Island Must Turn Over Suspect in Death-Penalty Spat*, THOMSON REUTERS, May 8, 2012, http://newsandinsight.thomsonreuters.com/Legal/News/2012/05_-_May/Rhode_Island_must_turn_over_suspect_in_death-penalty_spat/. The Governor has now petitioned for certiorari to the Supreme Court. See Katie Mulvaney, *State of RI Seeks U.S. Supreme Court Review in Pleau Death-Penalty Case*, PROVIDENCE J., Aug. 21, 2012, <http://news.providencejournal.com/breaking-news/2012/08/state-seeks-us.html>.

8. See, e.g., James Eng, *Too Crazy to Kill? Lawyers Try to Stop Execution of Inmate They Say is Mentally Ill*, NBCNEWS.COM (Feb. 2, 2012, 6:09 PM), http://usnews.nbcnews.com/_news/

after challenge under North Carolina's Racial Justice Act.⁹ A death row inmate who claims he cannot be executed by lethal injection because he is allergic.¹⁰ Yet another who claims he is too obese to be executed in any non-cruel manner (and at 480 pounds, he may well be right).¹¹

Here, however, I have chosen to focus on two areas, and the first only briefly. One important piece of the death penalty puzzle, especially in the realm of thinking small, is the phenomenon of cases with *issues*. Not all death penalty cases have issues, but enough do that there is almost always a case in one of the states that is causing a public outcry (or at least audible gasps), raising serious, high-profile questions about the death penalty. Think Troy Davis.¹² Timothy Cole.¹³ Anthony Graves.¹⁴ Cameron Todd Willingham.¹⁵ The West Memphis Three.¹⁶

I need not say much here because we are all familiar with the phenomenon. Every time there is an execution where the evidence is shaky, or an occasion where the defendant has been incarcerated for years and is then exonerated, we are left with the question: What happens when we get the death penalty wrong? That is the thing about the death penalty—it is so very permanent. We now have had over 140 exonerations from

2012/02/02/10302815-too-crazy-to-kill-lawyers-try-to-stop-execution-of-inmate-they-say-is-mentally-ill; John Hult, *James McVay Lawyers: No Death Penalty*, ARGUS LEADER (Sioux Falls, S.D.), June 15, 2012, http://www.argusleader.com/article/20120615/NEWS/306150024/James-McVay-lawyers-No-death-penalty?odyssey=tab%7Cmostpopular%7Ctext%7CNEWS&nclick_check=1. See generally Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 785 (2009).

9. See Campbell Robertson, *Bias Law Used to Move a Man Off Death Row*, N.Y. TIMES, Apr. 20, 2012, <http://www.nytimes.com/2012/04/21/us/north-carolina-law-used-to-set-aside-a-death-sentence.html?pagewanted=all> (reporting first win under North Carolina's Racial Justice Act and that nearly all of the state's 157 death row inmates have filed similar claims).

10. See Andrew Welsh-Huggins, *Anesthesia Allergy Could Complicate Ohio Execution*, COLUMBUS DISPATCH, Apr. 14, 2010, <http://www.dispatch.com/content/stories/local/2010/04/14/allergy-execution.html>; see also Judge: No Allergy Risk Proven for Ohio Execution, CORRECTIONSONE (Apr. 19, 2010), http://www.correctionsone.com/pc_print.asp?vid=2049629.

11. See Andrew Welsh-Huggins, *Ohio Inmate Says He's Too Obese for Execution*, COLUMBUS DISPATCH, Sept. 18, 2012, <http://www.dispatch.com/content/stories/local/2012/09/18/ohio-inmate-says-hes-too-obese-for-execution.html>.

12. See Nathan Thornburgh, *Witness Testimony and the Death Penalty: After Troy Davis, a Push for Eyewitness Reform*, TIME, Sept. 28, 2011, <http://www.time.com/time/nation/article/0,8599,2095209-1,00.html>.

13. See Peggy Fikac, *Perry Pardons Exonerated Convict Posthumously*, HOUS. CHRON., Mar. 1, 2010, <http://www.chron.com/news/houston-texas/article/Perry-pardons-exonerated-convict-posthumously-1706574.php>.

14. See Brian Rogers, *Texas Sets Man Free from Death Row*, HOUS. CHRON., Oct. 27, 2010, <http://www.chron.com/news/houston-texas/article/Texas-sets-man-free-from-death-row-1619337.php>.

15. See Chuck Lindell, *Thanks to Willingham Inquiry, Old Arson Cases Getting a New Look*, AUSTIN AM.-STATESMAN, Sept. 9, 2011, <http://www.statesman.com/news/texas-politics/thanks-to-willingham-inquiry-old-arson-cases-getting-1834087.html>.

16. See Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. TIMES, Aug. 19, 2011, <http://www.nytimes.com/2011/08/20/us/20arkansas.html?pagewanted=all>.

death row, cases in which we would have executed an innocent human being if only we had gotten around to it faster.¹⁷ And every case with *issues* slowly pushes the innocence problem more to the forefront of the public's consciousness, to the realm of the deeply disturbing.

But enough about that. Exonerations, even just lingering doubts about guilt, are an important piece of the death penalty puzzle, but one that I need not dwell on because we all know the phenomenon is out there, doing its *zeitgeist* thing.

The place I will spend some time is lethal injection. What I did not understand about the lethal injection issue until I started cruising the news is how this brouhaha started. It started with individual actors making decisions that snowballed into a massive hitch in the administration of capital punishment in the United States.

Until recently, lethal injection was typically accomplished using a three-drug protocol that included a drug called sodium thiopental, which, as it turns out, had just one domestic producer—a company called Hospira.¹⁸ Hospira did not approve of the use of its product for executions and first asked states not to use the drug for that purpose.¹⁹ But the states did not honor its request.²⁰ Hospira then had discussions with its distributors to see if they could block the sale of sodium thiopental to prisons but ultimately decided that the only way to stop the “misuse” of its drug was to stop making it altogether.²¹ So that is what Hospira did.²²

This caused all sorts of problems as death penalty states started looking beyond the United States for other suppliers of the drug. Germany has several pharmaceutical companies that make sodium thiopental, but they refused to export the drug to the United States for lethal injections, explaining in a joint statement, “This is not about money, but ethical principles.”²³ A Swiss pharmaceutical company also makes sodium thiopental, and it actually asked Nebraska to give its “wrongfully diverted” product back, stating that the company does not support

17. See *The Innocence List*, DEATH PENALTY INFO. CTR. (Oct. 1, 2012), <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

18. See Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J., Jan. 22, 2011, <http://online.wsj.com/article/SB10001424052748704754304576095980790129692.html>; see also *Hospira to Stop Making Lethal-Injection Drug*, DEATH PENALTY NEWS (Jan. 21, 2011), <http://deathpenaltynews.blogspot.com/2011/01/hospira-to-stop-making-lethal-injection.html>.

19. See Koppel, *supra* note 18.

20. See *id.*

21. *Hospira to Stop Making Lethal-Injection Drug*, *supra* note 18.

22. See *id.*

23. *Germany: No Death Penalty Drug to US*, FOXNEWS.COM (Jan. 24, 2011), <http://www.foxnews.com/world/2011/01/24/german-doctors-sodium-thiopental/>.

the use of its drug in lethal injections.²⁴ Great Britain produces sodium thiopental too, but it banned the export of lethal injection drugs to the United States and urged the European Union to do same, which it did.²⁵ Under the EU's new rule, pharmaceutical manufacturers may not export drugs used for executions in the United States unless they have a special permit showing that the export is not for executions.²⁶ Meanwhile, a prison warden back in the United States was quoted as saying, "I am beginning to think drug companies and suppliers are not real happy to have to supply us for this use."²⁷

The long and short of all this is that about the only way for states to get sodium thiopental for their executions is to get it illegally. Pakistan may be involved, some fly-by-night operation "in a gritty London neighborhood" too.²⁸ So now there is a veritable black market for sodium thiopental because nobody wants to sell it to the United States for executions, certainly not countries that abolished the death penalty almost fifty years ago.²⁹ And because there is a black market, there are also questions about whether the drugs that make it to the United States meet minimal purity standards, not to mention the fact that most lethal injection procedures assume that the drugs come from some approved or appropriate, or at least not illegal, source.³⁰

24. *Company Wants Neb. to Return Lethal Injection Drug*, CNSNEWS.COM (Nov. 30, 2011), <http://cnsnews.com/company-wants-neb-return-lethal-injection-drug>. One news account reported that the United States Secretary of Commerce asked the German Economics Minister for a supply of lethal injection drugs during a 2011 trip to Washington, D.C., but the Minister flatly refused. See *German Minister Denies US Request for Execution Drugs*, SPIEGEL ONLINE, June 9, 2011, <http://www.spiegel.de/international/world/european-opposition-to-death-penalty-german-minister-denies-us-request-for-execution-drugs-a-767613.html>.

25. See Sylvia Hui & Jan M. Olsen, *Britain Bans Exports of Execution Drugs to US*, SEATTLE TIMES, Apr. 14, 2011, http://seattletimes.com/html/nationworld/2014769149_apeudenmark_executiondrug.html. See also Juliette Jowit, *UK to Ban Export of Drug Approved for Use in US Executions*, THE GUARDIAN (London), July 10, 2012, <http://www.guardian.co.uk/world/2012/jul/10/uk-ban-export-drug-us-executions> (reporting Great Britain's ban on the export of propofol to the United States as well once states started changing their lethal injection protocols to use the drug).

26. See *EU Set to Ban Export of Drug Used in US Executions*, SPIEGEL ONLINE, Dec. 12, 2011, <http://www.spiegel.de/international/europe/death-penalty-opposition-eu-set-to-ban-export-of-drug-used-in-us-executions-a-803238.html>. Granted, the EU's rule is definitely *not* an example of thinking small.

27. *Companies Won't Sell Ky. Lethal Injection Drug*, FOXNEWS.COM (Jan. 18, 2011), <http://www.foxnews.com/us/2011/01/18/companies-wont-sell-ky-lethal-injection-drug/>.

28. Greg Bluestein, *States Look Overseas for Scarce Execution Drug*, NBCNEWS.COM (Mar. 25, 2011, 9:28 PM), http://www.msnbc.msn.com/id/42278159/ns/us_news-crime_and_courts/t/states-look-overseas-scarce-execution-drug/#.UGchwe2HK6o.

29. By 1968, seventy countries had formally rejected the death penalty, including almost all of Western Europe. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 111–12 (2010).

30. See Joe Duggan, *Killer Fights His Execution on Two Fronts*, OMAHA WORLD-HERALD, Feb. 14, 2012, at 3B (reporting on death row inmate's claim that stolen Swiss drug to be used for

Because states are importing the drug (often illegally), the Food and Drug Administration is also involved. It tried not to be. The FDA's first stance was that it was taking a hands-off approach to lethal injection drug imports.³¹ According to the FDA, it was tasked with regulating drugs to protect public health, and drugs used for lethal injection were definitely not for public health, so the whole enterprise was outside the ambit of its authority.³² That did not go over well in federal district court, where a District of Columbia judge found that the FDA had "arbitrarily and capriciously" abused its discretion in refusing to review the states' imports.³³ So now the FDA is asking states to turn over their stock of sodium thiopental for its review and approval.³⁴ Thus far, South Dakota has refused—California too.³⁵

The United States Drug Enforcement Agency has had better luck. Citing "questions about how the drug was imported," the DEA seized Georgia's entire supply of sodium thiopental in the spring of 2011, effectively preventing executions in the state.³⁶ It then seized Kentucky and Tennessee's supplies too, exacerbating shortages already plaguing states that have people to execute but lack the drugs to do so.³⁷ As it turns out, Kentucky had reached out to more than two dozen states to

lethal injection fails to meet U.S. purity standards); Tom Schoenberg, *Death Row Inmates Challenge FDA on Execution-Drug Imports*, BLOOMBERG (Feb. 9, 2012, 6:36 PM), <http://www.bloomberg.com/news/2012-02-09/death-row-inmates-challenge-u-s-fda-on-allowing-imports-of-execution-drug.html> (reporting on a challenge by twenty-one death row inmates to the use of sodium thiopental in executions because they are "unapproved, illegal drugs from an unregistered, foreign establishment"); see also Nicholas Bergin, *Pharmacist Sues Department of Correctional Services Over Firing*, LINCOLN J. STAR, Mar. 10, 2012, http://journalstar.com/news/local/crime-and-courts/pharmacist-sues-department-of-correctional-services-over-firing/article_9bbf09a4-a390-537f-bc7b-c84b46cd0a40.html (reporting suit filed by a former Department of Corrections employee for being fired for refusing to order a lethal injection drug from a non-approved source).

31. See Nathan Koppel, *FDA Takes Stance on the Importation of Lethal-Injection Drugs*, WALL ST. J. L. BLOG (Jan. 4, 2011, 4:40 PM), <http://blogs.wsj.com/law/2011/01/04/the-fda-takes-public-stance-on-the-importation-of-lethal-injection-drugs/>.

32. See *id.*

33. Zoe Tillman, *Judge Blocks Shipment of "Unapproved" Drug Used in Lethal Injections*, BLOG OF LEGALTIMES (Mar. 27, 2012, 2:37 PM), <http://legaltimes.typepad.com/blt/2012/03/judge-blocks-shipment-of-unapproved-drug-used-in-lethal-injections.html>.

34. See Peter Harriman, *Death Penalty Delay Looms*, ARGUS LEADER (Sioux Falls, S.D.), Apr. 18, 2012, at A1.

35. See *id.*; *Calif. Defies Order to Turn Over Execution Drug*, KSBY.COM (May 25, 2012, 12:10 PM), <http://www.ksby.com/news/calif-defies-order-to-turn-over-execution-drug/>.

36. *Ga. Execution Off: DEA Seizes Critical Drug*, WASH. TIMES, Mar. 16, 2011, <http://www.washingtontimes.com/news/2011/mar/16/ga-executions-dea-seizes-critical-drug/?page=all>.

37. *Ky. Hands Over its Lethal Injection Drug to DEA*, KYPOST.COM (Apr. 1, 2011), http://www.kypost.com/dpps/news/ky.-hands-over-its-lethal-injection-drug-to-dea_6216965; Roger Alford & Kristin M. Hall, *Tenn., Ky. Turn Over Lethal Injection Drug to DEA*, BOSTON.COM (Apr. 1, 2011), http://www.boston.com/news/nation/articles/2011/04/01/tenn_ky_turn_over_lethal_injection_drug_to_dea/.

obtain sodium thiopental before ultimately buying it from Georgia.³⁸ Tennessee had shared some of its supply with Georgia and Arkansas, and Arkansas had shared its supply with Oklahoma, Mississippi, and Tennessee, largely on a borrowing basis.³⁹ As one Arkansas official explained, it was understood that “there would be a payback when needed.”⁴⁰ And then there is California, which reportedly “scoured the nation” for sodium thiopental, calling hospitals, surgery centers, and even the Department of Veteran Affairs before eventually borrowing from Arizona.⁴¹ In gratitude, the California prison official who brokered the deal actually sent an e-mail to his Arizona counterpart offering to buy him a beer and adding, completely oblivious to the irony, “You guys in AZ are life savers.”⁴² Sometimes truth really is stranger than fiction.

So what can states determined to use the death penalty do? The chief alternative to sodium thiopental is a drug called pentobarbital, and states have increasingly turned to this drug for its executions instead.⁴³ But here, too, there is a hitch.

The sole supplier of pentobarbital in the United States is a Danish company called Lundbeck, and Lundbeck is likewise strongly opposed to the use of its drug in lethal injections.⁴⁴ According to the company, this “distressing misuse” of its product is “against everything we’re in business to do.”⁴⁵ The drug is intended to treat epilepsy and euthanize animals, Lundbeck claims, and is not safe for use in untested ways, including human executions.⁴⁶ Lundbeck has specifically asked several

38. Greg Bluestein, *States Beg, Borrow and Import Scarce Execution Drug; Ga. Is Investigated*, STAR TRIBUNE (Minneapolis-St. Paul), Mar. 25, 2011, http://www.startribune.com/templates/Print_This_Story?sid=118660629.

39. *See id.*

40. *Id.*

41. Sam Stanton, *California scoured U.S. for death-penalty drug, documents show*, THE SACRAMENTO BEE, Jan. 5, 2011, <http://blogs.sacbee.com/crime/archives/2011/01/california-scou.html>.

42. Bluestein, *supra* note 38.

43. *See* Ben Hirschler, *Limit Execution Drug Distribution: Docs to Company*, REUTERS, Jan. 6, 2012, available at <http://uk.reuters.com/article/2012/01/06/us-hospira-executions-idUKTRE80500K20120106> (reporting a group of doctors pressured Hospira to restrict sale of pentobarbital, which is being used in executions since Hospira stopped making sodium thiopental).

44. David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, N.Y. TIMES, July 1, 2011, http://www.nytimes.com/2011/07/02/world/europe/02execute.html?_r=0.

45. *Id.*; Andrew Welsh-Huggins, *Drug Maker Asks Ohio, Oklahoma Not to Use Sedative for Putting Inmates to Death*, STAR TRIBUNE (Minneapolis-St. Paul), Jan. 27, 2011, http://www.startribune.com/templates/Print_This_Story?sid=114672969.

46. *See* Sten Stovall, *Lundbeck Won’t Pull Controversial Drug*, WALL ST. J., June 29, 2011, <http://online.wsj.com/article/SB10001424052702304584004576415380592229742.html?>; *see also* Andrew Jack, *Danes Try to Block Use of Death Drug*, FIN. TIMES (London), June 8, 2011, at 4.

states not to use its drug in lethal injections, to no avail.⁴⁷ The company has now turned to end user clauses to stop the drug's use in executions.⁴⁸

What does all this mean for death penalty states? One thing it means is that a number of states are not executing—not because they don't want to, but because they can't. Suits are pending that challenge the drugs to be used in lethal injection as coming from unapproved, illegal, and unregistered sources.⁴⁹ One state has answered that the point is moot because its existing supply of the drugs has expired, and it cannot obtain more anyway.⁵⁰

It also means that once again, states are on the hunt for a new paralytic to use in lethal injections. Missouri recently changed its protocol to use a drug called propofol for lethal injection, which is what caused the death of Michael Jackson.⁵¹ The state will likely have to try again, however, since the second of the only two domestic suppliers of propofol has now said it will not accept orders of the drug from U.S. corrections departments.⁵² Virginia has turned to a drug called rocuronium bromide, which forty-two states have banned as a paralytic for euthanizing animals because it may cause excruciating pain.⁵³ Texas, too, switched its drug protocol due to shortages in its existing supply, then adopted a non-disclosure policy for all lethal injection drug information.⁵⁴ Oklahoma has said that once it runs out of pentobarbital, its method of execution

47. See Reginald Fields, *Ohio Sticking with New Drug for Executions Despite Manufacturer's Request Not to Use It*, CLEVELAND.COM (Jan. 31, 2011, 5:00 AM), http://www.cleveland.com/open/index.ssf/2011/01/ohio_sticking_with_new_drug_fo.html; Tim Talley, *Oklahoma Plans to Continue Using Sedative in Executions Despite Manufacturer's Objections*, STAR TRIBUNE (Minneapolis-St. Paul), Jan. 27, 2011, http://www.startribune.com/templates/Print_This_Story?sid=114753419.

48. Jack, *supra* note 46.

49. See *supra* note 30.

50. See Scott Lauck, *Lack of Sodium Thiopental Makes Lethal Injection Challenge Moot*, MO. LAWYERS MEDIA, May 8, 2012, <http://molawyersmedia.com/blog/2012/05/08/lack-of-sodium-thiopental-makes-lethal-injection-challenge-moot/>.

51. See Tony Rizzo, *Missouri Executions May Restart with Drug Propofol*, ST. LOUIS POST-DISPATCH, May 19, 2012, http://www.stltoday.com/news/national/missouri-executions-may-restart-with-drug-propofol/article_fe409630-ace5-5864-9d8b-acbc68461372.html.

52. See Alan Scher Zagier, *Another Manufacturer Blocks Drug for Execution Use, Clouding Missouri's Plans*, KAN. CITY STAR, Sept. 27, 2012, <http://www.kansascity.com/2012/09/27/3837083/another-manufacturer-blocks-drug.html>.

53. See Larry O'Dell, *Virginia Adds New Lethal-Injection Drug*, HAMPTONROADS.COM (July 27, 2012), <http://hamptonroads.com/2012/07/virginia-adds-new-lethalinjection-drug>; Ty Alper, Editorial, *Alper: Virginia Kills Dogs More Gently Than This*, RICHMOND TIMES-DISPATCH, Aug. 7, 2012, <http://www2.timesdispatch.com/news/rtd-opinion/2012/aug/07/tdopin02-virginia-kills-dogs-more-gently-than-this-ar-2112586/>.

54. See Nomaan Merchant, *Texas Switches to 1-Drug Execution Due to Shortage*, BIG STORY (July 10, 2012, 8:24 AM), <http://bigstory.ap.org/article/apnewsbreak-texas-switches-1-drug-execution>; Allan Turner, *TDCJ Wants to Block Release of Lethal Injection Drug Info*, HOUS. CHRON., Apr. 3, 2012, <http://www.chron.com/default/article/TDCJ-wants-to-block-release-of-lethal-injection-3457080.php>.

will be “up in the air.”⁵⁵

Not only is the shortage of lethal injection drugs gumming up the execution process, but it is also requiring states to rewrite their lethal injection statutes, which is causing problems of its own. Arkansas, for example, had amended its lethal injection statute to allow the Department of Corrections to choose “one or more chemicals” for use in lethal injection, but its Supreme Court struck down the law, holding that such “unfettered discretion” in the executive branch did not pass constitutional muster.⁵⁶ And then there is California, which cannot seem to get an execution to save its life. Having just revised its three-drug protocol to remedy constitutional deficiencies in its prior lethal injection procedure, the state has now been told that its protocol is again deficient, in part because it failed to consider a one-drug option.⁵⁷ So back to the drawing board California goes.

As one might imagine, all the logistical and legal troubles associated with lethal injection have also had a dramatic effect on the cost of this execution procedure. A 2012 article reported that states now pay fifteen times more for the chemicals they use in executions than they did a year ago,⁵⁸ while a similar 2011 article estimated the cost at ten times greater than it had been in years past.⁵⁹ One cannot help but think of Oregon in this regard—its governor recently imposed a moratorium on executions, and now the state is hoping to recover some \$18,000 on lethal injection drugs by selling them back to the wholesaler.⁶⁰ But if Oregon were *really* smart, it would just call states like Texas, Virginia, Georgia, and Ohio and offer to sell its drugs to the highest bidder. (Granted, that may be missing the point.)

Problems with the drugs involved are not the only thing slowing the pace of lethal injections—the death chambers in which lethal injections

55. Andrew Knittle, *Method of Future Oklahoma Executions ‘Up in the Air’ Official Says*, NEWSOK (May 3, 2012), <http://newsok.com/method-of-future-oklahoma-executions-up-in-the-air-official-says/article/3671838>.

56. Jeannie Nuss, *Arkansas Supreme Court Strikes Down Execution Law*, WASH. TIMES, June 22, 2012, <http://www.washingtontimes.com/news/2012/jun/22/arkansas-supreme-court-strikes-down-execution-law/?page=all>.

57. Carol J. Williams, *California’s New Lethal Injection Protocol Tossed by Judge*, L.A. TIMES, Dec. 17, 2011, <http://articles.latimes.com/2011/dec/17/local/la-me-executions-20111217>.

58. Khadeeja Safdar, *Legally Killing People Has Gotten A Lot More Expensive*, HUFFINGTON POST (Mar. 30, 2012, 8:14 PM), http://www.huffingtonpost.com/2012/03/30/lethal-injection_n_1391408.html.

59. Andrew Welsh-Huggins, *States: Death-Penalty Drug Scramble, Higher Cost*, BUSINESSWEEK.COM (July 9, 2011, 2:14 PM), <http://www.businessweek.com/ap/financialnews/D9OC9L100.htm>.

60. See Helen Jung, *State Expects to Recoup Much of the \$18,000 Spent on Execution Drugs*, OREGONIAN, Jan. 3, 2012, http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/01/state_expects_to_recoup_most_o.html.

occur have come under fire as well. In Montana, for example, the execution chamber is a decades-old, single-wide trailer that was once used as a residence but has since been retrofitted for executions.⁶¹ Apparently, the trailer is so decrepit that it is no longer usable, so the state proposed replacing it with a new, 800-square foot “multipurpose room” that would be used mainly for storage, but could function as a “makeshift execution chamber” on the side.⁶² Ultimately, however, Montana decided that although it indeed needed a new execution chamber, it had other needs to tend to first.⁶³ So for now, the trailer-turned-execution-chamber stands.⁶⁴ As a Montana native, somehow I get that.

And then there is Nevada. In Nevada, the State Public Works Board determined that the state’s death chamber was not up to code because it did not comply with the Americans with Disabilities Act.⁶⁵ Yes, you just read that right—Nevada is concerned about whether its death chamber is wheelchair accessible. At this point, however, the state has to be concerned because if the death chamber is out of compliance, it cannot be state certified, and if it is not state certified, it cannot be used for executions. Apparently, bringing the chamber into ADA compliance is going to cost thousands of dollars, in part because it would require installing an elevator.⁶⁶ Nevada officials have stated that they may update the chamber, or they may just phase it out and build a new death chamber that is up to code instead.⁶⁷ Prison officials say it makes no difference at this point as they do not have the drugs necessary to carry out an execution anyway.⁶⁸

61. Jennifer McKee, *Montana to Build Multipurpose Execution Site*, BILLINGS GAZETTE, Jan. 11, 2010, http://billingsgazette.com/news/state-and-regional/montana/article_80752a20-ff3a-11de-b4b0-001cc4c03286.html.

62. *Id.* When it was not being used to execute people, the death chamber would store shoes, portable food heaters, and extra mattresses, among other things. *See id.*

63. *See* Jennifer McKee, *Execution Chamber Won’t Move, State Corrections Department Now Says*, MISSOULIAN (Montana), Jan. 12, 2012, http://missoulain.com/news/state-and-regional/article_bef7ee6-fff0-11de-9e4e-001cc4c002e0.html.

64. It is unlikely to get much use, however, as a Montana judge has since struck down the state’s lethal injection procedure. *See* Laura Zuckerman, *Montana judge strikes down state execution method*, WASH. POST (Sept. 8, 2012), http://articles.washingtonpost.com/2012-09-08/national/35498038_1_state-execution-method-execution-process-lethal-injection. *See also* Katie Schneider, *Judge finds execution method unconstitutional*, SUN NEWS, (Sept. 7, 2012, 8:37 AM), <http://www.sunnewsnetwork.ca/sunnews/world/archives/2012/09/20120907-083718.html> (quoting the defendant’s lawyer as saying, “The drug is just one facet of it—it also has to do with the people who are qualified to administer it, the facility they have, it’s a lot more involved than just the drug.”).

65. *See* Cy Ryan, *State Official: Nevada Execution Chamber Unusable*, LAS VEGAS SUN, Mar. 8, 2011, <http://www.lasvegassun.com/news/2011/mar/08/public-works-official-states-execution-chamber-unu/>.

66. *Id.*

67. *Id.*

68. *Id.*

Then finally, there is the question of *who* performs the lethal injection procedure. The American Medical Association opposes physician involvement, although thus far it has not imposed sanctions on doctors who choose to participate.⁶⁹ The same cannot be said for the American Board of Anesthesiologists, which voted in 2011 to revoke the certification of members who conduct lethal injections, which would effectively prevent them from working at most hospitals.⁷⁰ In Ohio, emergency medical technicians administer lethal injections, which a local governing board said did not violate their duties as EMTs because they are not serving as EMTs when putting people to death.⁷¹ In Virginia, by contrast, defense attorneys claimed that lethal injections by anyone *other* than trained doctors amounted to practicing medicine without a license (the judge in the case commended the attorneys for their “imaginative” challenge, then promptly dismissed it).⁷² For its part, North Carolina cannot seem to make heads or tails of this quandary; the question of whether medical ethics prohibit doctors from attending executions has resulted in an unofficial moratorium on executions since 2006.⁷³

All of this brings me to my second, and more brief, point—the huge impact that all these developments have had.

II. WINNING BIG

If thinking small has shown anything, it has shown how numerous actions at the ground level have thrown a wrench into the administration of capital punishment in the United States. What I discuss now is how that, in turn, is feeding into another debate over the death penalty—a debate about cost. And cost, for better or worse, is an issue on which death penalty opponents are winning big.

69. See Rob Stein, *Group to Censure Physicians Who Play Role in Lethal Injections*, WASH. POST, May 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/01/AR2010050103190.html?hpid=topnews>.

70. *Id.*; Rachel Fields, *American Board of Anesthesiologists to Revoke Certification of Anesthesiologists Who Participate in Lethal Injection*, BECKER'S ASC REV., June 10, 2011, <http://www.beckersasc.com/anesthesia/american-board-of-anesthesiologists-to-revoke-certification-of-anesthesiologists-who-participate-in-lethal-injection.html>.

71. See Suzanne Hoholik, *EMT Board Ducks Death-Penalty Flap*, COLUMBUS DISPATCH, Aug. 20, 2009, http://www.dispatch.com/content/stories/local/2009/08/20/Lethal.ART_ART_08-20-09_B1_F9EQQ0J.html.

72. *Hearing Set Today in Richmond in Suit Challenging Lethal Injection*, RICHMOND TIMES-DISPATCH, Sept. 19, 2012, <http://www2.timesdispatch.com/news/2012/sep/19/hearing-set-today-richmond-suit-challenging-lethal-ar-2216861/>; Larry O'Dell, *Update: Judge Rejects Suit Challenging Lethal Injection in Va.*, RICHMOND TIMES-DISPATCH, Sept. 19, 2012, <http://www2.timesdispatch.com/news/2012/sep/19/3/judge-rejects-suit-challenging-lethal-injection-va-ar-2217805/>.

73. Editorial, *N.C. Death Penalty Rife with Problems*, WINSTON-SALEM J., Jan. 2, 2011, <http://www2.journalnow.com/news/opinion/2011/jan/02/wsopin01-nc-death-penalty-rife-with-problems-ar-658160/>.

With the addition of Connecticut in April 2012, five states have now abandoned the death penalty in the last five years.⁷⁴ In each of those states, the cost of the death penalty—or at least what the state was getting for the cost—played a critical role in the decision to abandon capital punishment as the ultimate sanction. Illinois reported that it had spent some \$100 million on the death penalty in the ten years prior to its abolition in 2011, and had executed no one during that time.⁷⁵ New York estimated that it spent \$170 million on the death penalty in the modern era,⁷⁶ while New Jersey's estimate was \$253 million—and neither of those states had a single execution to show for it.⁷⁷ New Mexico's governor explicitly cited economic considerations when the state abandoned the death penalty as well.⁷⁸ In Connecticut, cost does not appear to have been a driving factor in abolition, but the “unworkability” of the death penalty was.⁷⁹ In the modern death penalty era, the state had executed only two individuals, and only then because both had volunteered for it.⁸⁰

California's death penalty costs are astronomically high, which to some extent is understandable because the state has the largest death row in the country—but even so, its experience is revealing. In 2008, a study by the California Commission on the Fair Administration of Justice reported that it costs California around \$137 million annually to maintain its current death penalty system (the study claims that this is a conservative figure, and indeed other sources have put the figure much higher).⁸¹ The same study estimated that it would cost California

74. See *Recent Legislation: Governor's Signature Makes Connecticut Fifth State in Five Years to End Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 25, 2012), <http://www.deathpenaltyinfo.org/recent-legislation-governors-signature-makes-connecticut-fifth-state-five-years-end-death-penalty>.

75. *Illinois House Votes to End Death Penalty: Should States Abolish Capital Punishment to Cut Costs?*, ABC WORLD NEWS (Jan. 7, 2011), <http://abcnews.go.com/WN/illinois-house-votes-end-death-penalty-states-abolish/story?id=12563165#.UGdmj02HK6o>.

76. The modern era of the death penalty began in 1976, when the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976) approved state legislation reinstating the death penalty after *Furman v. Georgia*, 408 U.S. 238 (1972) had ruled it unconstitutional as applied in 1972.

77. RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 14 (2009), available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

78. DIETER, *supra* note 77, at 13.

79. David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN (Apr. 25, 2012), http://articles.cnn.com/2012-04-25/justice/justice_connecticut-death-penalty-law-repealed_1_capital-punishment-death-penalty-information-center-death-sentences?_s=PM:JUSTICE.

80. *Id.*; see also *supra* note 76 (explaining notion of modern death penalty era).

81. See CAL. COMM'N ON THE FAIR ADMINISTRATION OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 10 (JUNE 30, 2008) [hereinafter CAL. COMM'N REPORT], <http://www.deathpenalty.org/downloads/FINAL%20REPORT%20DEATH%20PENALTY%20ccfaj%20June%2030.2008.pdf>; Carol J. Williams,

approximately \$11.5 million annually to maintain a penal system with a maximum punishment of life without the possibility of parole.⁸² From those estimates, the Commission concluded that abolishing the death penalty in California could save the state around \$125 million annually,⁸³ and a separate 2012 study has now estimated the cost savings at around \$130 million per year.⁸⁴ Thus far, California has spent around \$4 billion on its death penalty in the modern era, with only thirteen executions to show for it.⁸⁵ You do the math—that amounts to an average of over \$300 million per execution. That's a lot of health care. A lot of education. A lot more police officers on the streets. Little wonder California decided to scrap its \$356 million plan to build a new death row⁸⁶ and put a repeal initiative on ballot instead.⁸⁷

Other, more active death penalty states are seeing cost come into play as well. In Texas, more and more prosecutors are declining to seek the death penalty in cases where it is an option, citing the death penalty's high cost as a factor in their decision-making.⁸⁸ In Virginia, too, prosecutors are taking the death penalty off the table, apparently because life-in-prison sentences result in savings to the state's taxpayers.⁸⁹ Meanwhile, Missouri has become the first state to provide sentencing judges with defendant-specific data on what particular punishments would cost.⁹⁰

Cost, and what the states get for it, is profoundly impacting the death penalty debate. The death penalty is breathtakingly expensive to maintain as a penal practice, and we do not get much bang for the buck.

Death Penalty Costs California \$184 Million a Year, Study Says, L.A. TIMES, June 20, 2011, <http://articles.latimes.com/2011/jun/20/local/la-me-adv-death-penalty-costs-20110620>.

82. See CAL. COMM'N REPORT, *supra* note 81, at 10.

83. See *id.*

84. Maggie Clark, *Cost Concerns Lead California's Death Penalty Repeal Debate*, STATELINE (Aug. 31, 2012), <http://www.pewstates.org/projects/stateline/headlines/cost-concerns-lead-californias-death-penalty-repeal-debate-85899414772>.

85. *Id.*

86. Press Release, Office of the Governor, Governor Brown Cancels Plan to Build New \$356 Million Condemned Inmate Housing Facility at San Quentin (Apr. 28, 2011), available at <http://gov.ca.gov/news.php?id=17010>.

87. See *Californians to Vote on Abolishing Death Penalty*, FOXNEWS.COM (Apr. 24, 2012), <http://www.foxnews.com/us/2012/04/24/californians-to-vote-on-abolishing-death-penalty/>. In November 2012, California's repeal initiative was defeated by a vote of 53 to 47 percent. See DPIC, *California Retains Death Penalty by Narrow Margin* (Nov. 7, 2012), <http://www.deathpenaltyinfo.org/california-retains-death-penalty-narrow-margin>.

88. See David Pittman, *Death Penalty Pursuit: Cost vs. Certainty*, AMARILLO GLOBE-NEWS, Feb. 1, 2010, http://amarillo.com/stories/020110/new_news3.shtml.

89. See Shawn Day, *State's Budget Woes Starting to Pinch Death Penalty Cases*, VIRGINIAN-PILOT, Dec. 7, 2009, at A1.

90. See Heather Ratcliffe, *Missouri Judges Get Penalty Cost Before Sentencing*, ST. LOUIS POST-DISPATCH, Sept. 14, 2010, http://www.stltoday.com/news/local/crime-and-courts/article_924097a5-9f4d-54bb-80ca-4cc4160dde7c.html.

Only one in 500 murders results in a death sentence,⁹¹ and those that do rarely lead to an execution. In 2010, the most recent year for which there is published data, 119 people were removed from death row.⁹² Of those, forty-six were executed, twenty died while they were waiting, and fifty-three were removed because of overturned convictions or commutations.⁹³ Demurring on the death penalty is no longer about being “soft on crime”—it is about being “smart on crime.” It makes no sense to have a death penalty that costs millions to maintain, but is almost never used.

III. CONCLUDING THOUGHTS

In these austere times, the fact that the death penalty is so expensive to maintain, and so hard to carry out, is changing the script of the death penalty debate. Before, voting against the death penalty was political suicide.⁹⁴ Now it is couched in terms of fiscal responsibility. Because it saves the taxpayers money, it is the right thing to do. Money is the new morality.

I, for one, view this development with mixed emotions. There are now over 140 people who were exonerated while on death row—over 140 people who the state claimed the right to execute and whose innocence has been proven.⁹⁵ But that has not moved us.

We have dozens upon dozens of studies proving that the death penalty today is as arbitrary and capricious—and, let’s face it, racially discriminatory—as it was in 1972, when it was temporarily abolished.⁹⁶ Death today turns more on the victim’s race,⁹⁷ and random factors like the county where the crime was committed,⁹⁸ than it turns on the worst

91. Betsey Stevenson & Justin Wolfers, *The Death-Penalty Debate Represents a Market Failure*, BLOOMBERG (June 11, 2012), <http://www.bloomberg.com/news/2012-06-11/the-death-penalty-debate-represents-a-market-failure.html>.

92. TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 236510, CAPITAL PUNISHMENT, 2010 – STATISTICAL TABLES 1 (2011).

93. *Id.*

94. See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 38 (2007) (discussing death penalty support in late 1980s and resistance by elected officials as political suicide).

95. *The Innocence List*, *supra* note 17.

96. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972); Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1255–56 (2011); David R. Dow, *Death Penalty, Still Racist and Arbitrary*, N.Y. TIMES, July 9, 2011, at A19.

97. See Adam Liptak, *A New Look at Race When Death Is Sought*, N.Y. TIMES, April 29, 2008, at A10.

98. See FRANK R. BAUMGARTNER, THE GEOGRAPHY OF THE DEATH PENALTY 2–3, 5 (2010), available at <http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner-geography-of-capital-punishment-oct-17-2010.pdf>; Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861 (2007); *Death penalty is applied unevenly statewide*, THE SACRAMENTO BEE (Sept. 11, 2012), <http://www>.

crime or even the worst criminal. But that has not moved us.

We have long heard about capital trials with woefully inadequate defense counsel, cases where people whose lives were at stake were represented by underpaid lawyers who were sleeping or drunk or otherwise grossly incompetent.⁹⁹ We have heard about the death penalty's dubious efficacy as a deterrent,¹⁰⁰ and the sheer immorality of the killing state.¹⁰¹ But none of those arguments has moved us.

There is an unspoken cost to monetizing the death penalty debate—a cost to sparing an individual's life just because it is not worth taking. But as for me, I will take an abolition argument that works over a moral argument that does not, and if thinking small helps us get there, then so be it. Here's to Scott Sundby and the virtues of thinking small.

sacbee.com/2012/09/11/4806968/death-penalty-is-applied-unevenly.html (“Whether defendants get the death penalty depends as much, if not more, on *where* they did their crime as *what* they did.”).

99. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1835–36 (1994).

100. See Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489 (2009).

101. See THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE (Austin Sarat ed. 2001).